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Montana's Veterans' and Handicapped Civilians' Employment Preference Law

A Report to the 49th Legislature Joint Interim Subcommittee No. 4

December 1984

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MONTANA'S VETERANS' AND HANDICAPPED CIVILIANS' EMPLOYMENT PREFERENCE LAW

A REPORT TO THE 49TH LEGISLATURE

JOINT INTERIM SUBCOMMITTEE NO. 4

November 1984

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SUMMARY OF RECOMMENDATION

Joint Interim Subcommittee No. 4 recommended that the Montana Legislature meeting in special session in December 1983 enact a bill repealing the statutes requiring public employers to give absolute preference in employment to veterans, veterans' spouses, disabled veterans' dependents, and certain disabled civilians (10-2-201 through 10-2-206, MCA) and providing instead a relative preference for certain veterans and handicapped persons and their eligible spouses.

HOUSE JOINT RESOLUTION NO. 41

A JOINT RESOLUTION OF THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA REQUESTING AN INTERIM STUDY OF MONTANA'S EMPLOYMENT PREFERENCE LAWS CONCERNING VETERANS, VETERANS' SPOUSES AND DEPENDENTS, AND DISABLED CIVILIANS; AND REQUIRING A REPORT OF THE FINDINGS AND RECOMMENDATIONS OF THE STUDY TO THE 49TH LEGISLATURE.

WHEREAS, Montana's employment preference laws for veterans, veterans' spouses and dependents, and disabled civilians, contained in Title 10, chapter 2, part 2, originally were enacted for veterans in 1921 and were amended to include disabled civilians in 1927; and

WHEREAS, the preference laws have historically been interpreted to entitle tie-breaking preference in initial employment to veterans, veterans' spouses and dependents, and disabled civilians, but in the recent case of Crabtree v. Montana State Library, a state District Court interpreted the laws as entitling minimally qualified veterans, veterans' spouses and dependents, and disabled civilians to employment preference over all others; and

WHEREAS, the preference laws are extremely ambiguous, lacking adequate definitions with regard both to the individuals covered and to procedures for implementing the preference; and

WHEREAS, the preference granted under these laws has historically been administered inconsistently; and

WHEREAS, Montana's public policy with regard to veterans, veterans' spouses and dependents, and disabled civilians is of great significance to all Montanans; and

WHEREAS, the 48th Legislature considered House Bill No. 378, Senate Bill No. 197, and Senate Bill No. 377, all of which pertain to this subject, and was unable to reach a consensus regarding the policy direction that must be taken, largely because the subject is highly emotional and controversial and requires decisions to be made involving the competing interests of many groups, all of which are vital to Montana's well-being; and

WHEREAS, although the various interest groups also were unable to reach a consensus regarding the policy direction that must be taken, they did agree prior to the 48th Legislative Session on the need for clarification of the preference and procedures for administering it.

(Continued)

NOW, THEREFORE, BE IT RESOLVED BY THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA:

That an appropriate interim committee be assigned to study Montana's employment preference laws for veterans, veterans' spouses and dependents, and disabled civilians and to address the following issues:

(1) what ambiguities or omissions exist in the current statutory language;

(2) whether the preference should be used as a tie breaker between equally qualified applicants or as an entitlement for minimally qualified veterans, veterans' spouses and dependents, and disabled civilians;

(3) whether the preference conflicts with the constitutional and statutory rights of other groups of citizens or conflicts with the obligations of employment relations contained in collective bargaining agreements;

(4) the purpose the preference laws are intended to serve and other possible means for serving similar purposes, including providing positive recognition to veterans, veterans' spouses and dependents, and disabled civilians;

(5) the extent to which preference should be applied, including whether application of the preference should be expanded or narrowed with regard to the individuals or employers covered or in duration of eligibility; whether preference should be applied equally or prioritized among the individuals covered; and whether the individuals covered should have obligations to make their preference known and determine their eligibility for preference;

(6) the status of similar preference laws in other states;

(7) the history of the implementation of Montana's laws in state, county, city, university, and other applicable government agencies; and

(8) any other issues the committee considers to be relevant.

BE IT FURTHER RESOLVED, that in its study the committee work with and seek input from representatives of all levels of government, veterans' organizations, organizations protecting the rights of the handicapped, women's organizations, and any other interested persons or groups.

BE IT FURTHER RESOLVED, that the committee make recommendations for improving the existing preference laws and report these and any other findings to the 49th Legislature.

I. INTRODUCTION

With passage of House Joint Resolution No. 41 (HJR 41), the 1983 Legislature authorized appointment of a legislative committee to study Montana's veterans' and disabled civilians' employment preference statutes. These statutes, as interpreted by the Montana Supreme Court, required public employers to give absolute preference in employment to veterans, veterans' spouses, disabled veterans' dependents, and certain disabled civilians. Under the mandates of HJR 41, a bipartisan panel of four senators and four representatives was appointed in June 1983 to identify ambiguities or omissions in the law, to determine whether the preference conflicted with the rights of other groups, and to decide what purpose the preference law should serve and to what extent it should apply. This panel of legislators, one of four legislative subcommittees appointed during the 1983-1984 interim, became known as Joint Interim Subcommittee No. 4.

This report provides background information on the employment preference controversy, describes Subcommittee No. 4's deliberations on the preference issue, and summarizes the legislation recommended by the Subcommittee. The report concludes with a comparison of the Subcommittee's bill as introduced and as eventually adopted by the 48th Legislature meeting in special session in December 1983. Additional information on the work of the Subcommittee is available through the Legislative Council, Research Division, Room 140, State Capitol, Helena, Montana 59620.

Numerous state and local government agencies; veterans', women's, labor, and handicapped persons'

organizations; and individual citizens attended and actively participated in public hearings on the preference issue. The Committee thanks these people for their input and assistance.

II. BACKGROUND OF THE ISSUE

The employment preference law under study by Subcommittee No. 4 consisted of six sections codified as 10-2-201 through 10-2-206 in the Montana Code Annotated. This section outlines the major provisions of the law, then reviews the district court's interpretation of the statutes, the Legislature's response to the employment preference issues during the 1983 regular session, the Supreme Court's interpretation of the law, and the public employers' response.

Summary of the Preference Law

The employment preference law was enacted in 1921 and amended nine times after its enactment. A complete text of the preference statutes is contained in Appendix A. The following summary highlights the major provisions of the law as it stood during the study.

10-2-201. Purpose. The purpose of the employment preference law was to give preference "in appointment and employment" to the following groups: veterans, their dependents and unremarried surviving spouses, and certain disabled civilians. The preference applied to employment in "every public department and upon all public works" of state, county, and municipal government.

10-2-202. Definitions. By defining the term "veteran", this section identified those former military personnel entitled to employment preference. According to the definition, two groups

qualified as veterans: (1) persons who had served in the United States armed forces during war or declared national emergency and who had left the service under conditions other than dishonorable; and (2) persons who after January 31, 1955, had been honorably discharged and had served on active military duty for more than 180 days or had been discharged or released because of a service-connected disability. Other terms defined in this section included "war or declared national emergency", "surviving spouse", and "percent".

10-2-203. Preference in appointment and employment. This section required state, county, and municipal employers to give an absolute employment preference to: (1) veterans, (2) veterans' spouses and surviving spouses, (3) disabled veterans' dependents, and (4) disabled civilians recommended by the Department of Social and Rehabilitation Services. The section further stated that "age, loss of limb, or other physical impairment" that was not incapacitating did not disqualify a disabled veteran or civilian from employment if he or she had the "business capacity, competency, and education" to do the job. Furthermore, disabled veterans were to be given preference in employment over other veterans.

10-2-204. Credit for examination. In addition to the absolute preference granted in 10-2-203, this section gave certain preferred persons

additional points when written or oral examinations were used in hiring procedures. Disabled veterans, their spouses, surviving spouses, and other dependents were to have had 10 points added to their exam scores while all other veterans, their spouses, surviving spouses, and dependents were to have had 5 points added. Disabled civilians were not entitled to additional points.

10-2-205. Eligibility. According to this section, a person was not entitled to employment preference if he had refused to serve on active duty in the military or refused to "take up arms" to defend the country. Moreover, a person was required to meet certain residency requirements to receive employment preference. He must have been a Montana resident for at least 1 year immediately before accepting employment. If he were applying for a city or county job, he must have been a resident of the municipality or county in which he was seeking employment.

10-2-206. Enforcement of preference. This section outlined the procedure to be used by a preferred person who believed he had been denied employment in violation of the above sections. The process began with the unsuccessful applicant filing a petition in the district court in the county where the work was to be performed. After filing the petition, the judge would order the public employer to appear in court not less than 5 or more than 10 days after the petition was

filed to explain why the preferred applicant did not get the job. If the court found that the preferred applicant had been wronged, the judge may have ordered the public employer to comply with the law in giving the required preference.

The District Court Decision in Crabtree

The event that initially sparked public and legislative interest in the employment preference law was a 1982 district court decision, Crabtree v. Montana State Library. (Dist. Ct. First Jud. Dist., Feb. 14, 1982, Bennett, J.) The case was brought by Vivian Crabtree, a legally blind applicant for a position with the Montana State Library. After receiving notice that she had not been hired for the position, Crabtree filed a petition in district court in Helena seeking to enforce the provisions of the employment preference law. The trial was held in October 1981.

In briefs submitted to the district court, Crabtree argued that the employment preference was absolute in nature. Under this interpretation of the law, Crabtree claimed that she should have been hired over all other qualified applicants, regardless of the relative qualifications of the other candidates, because she possessed the capacity, competency, and education to discharge the duties of the position. The library, however, argued that the employment preference law required that preferred veterans and disabled persons be hired when their qualifications were substantially or reasonably equivalent to competing applicants.

Evidence, such as application for employment forms and employment guides, was presented during the trial,

indicating that state policy had been to interpret the preference as a relative one, not as an absolute preference as contended by the petitioner.

The court, issuing its decision in February 1982, sided with Crabtree. It ruled that the state had erred in its interpretation of the preference statute. Noting that the law contained no language suggesting that the preference was relative to the qualifications of other applicants, the court said that the only limiting factor to hiring a preference-eligible candidate was the disabled civilian's or veteran's ability to perform the duties of the position. The court ordered the library to reopen the selection process for the position and to give preference to any minimally qualified disabled civilian over all other nondisabled civilian applicants. The library filed a notice of appeal to the Montana Supreme Court.

The Legislature's Reaction

While the Crabtree case was on appeal, the 1983 Legislature meeting in regular session had its opportunity to react to the issues surrounding employment preference. Three bills (SB 197, SB 377, and HB 378) and one joint resolution (HJR 41) were introduced for the Legislature's consideration.

SB 197 restricted employment preference to three groups: (1) veterans, (2) disabled persons, and (3) "certain dependents", defined as spouses of disabled veterans unable to use their preference because of a service-connected disability and unremarried surviving spouses or other dependents of veterans who died because of a service-connected disability or who died

while on active duty. Under the provisions of the bill, disabled veterans and disabled civilians would be treated equally when scored procedures are used during the hiring process; each would receive an additional 10 percentage points. Other veterans and dependents of veterans would be entitled to 5 additional points.

In turning away from the district court's interpretation of the preference as being absolute in nature, the bill defined the preference as a tie breaker between applicants of "substantially equal qualifications". This preference was applied to initial hiring and then extended to layoffs during and rehiring after reductions in force. However, in cases of layoffs and rehirings, language was added to protect "affected classes" (people currently suffering employment discrimination or suffering from the continuing effects of past discrimination based on race, gender, or handicap).

SB 197 further provided that it is the preferred person's duty to establish his eligibility for preference and to notify the public employer of his eligibility. The bill also revised the enforcement procedures by requiring an administrative review before an unsuccessful applicant can seek redress through the courts. Finally, the bill authorized the Department of Administration to adopt rules to implement the employment preference statutes.

Although similar in many respects to SB 197, SB 377 was narrower in scope. It restricted the application of employment preference to initial appointment or hiring. Moreover, it prohibited the appointment of a preferred person over a nonpreferred person who is a member of an

affected class. This made persons who suffer or have suffered from discrimination based on race, gender, or handicap competitive with veterans and their dependents during the hiring process. SB 377 also prohibited a retired member of the armed forces who is receiving a pension from claiming employment preference. In all remaining provisions, SB 377 was identical to SB 197.

HB 378 consisted of a single provision. It extended the veterans' and handicapped civilians' preference to reappointment and retention in employment.

The Legislature was unwilling to resolve the issues surrounding the employment preference law by enacting SB 197, SB 377, or HB 378. Instead, the legislators agreed to defer decisionmaking by adopting HJR 41. This resolution required an interim legislative committee to study the preference issue and to make recommendations to the 1985 Legislature.

The Supreme Court Decision in Crabtree

It was 2 months after the Legislature adjourned that the Montana Supreme Court issued its opinion in Crabtree v. Montana State Library, (665 P2d, 40 St. Rep. 963 (1983)). In June 1983, the supreme court unanimously held in favor of Crabtree.

In affirming the lower court ruling, the supreme court concluded that the Legislature had intended to grant an absolute preference to certain classes of applicants by enacting the employment preference statutes. The court said that it viewed the preference statutes as being an affirmative action program designed to bestow certain benefits to covered classes. The law did not

discriminate against women in violation of existing statutes because it applied to both male and female veterans and disabled civilians.

The court dismissed the claim raised by local governments in an amicus brief that an absolute preference would subject public employers to countless lawsuits for negligent hiring; it noted that this claim was based on an unfounded assumption that a preferred applicant would not be required to be qualified for the particular job.

Finally, the court upheld the remedy ordered by the district court. The justices agreed that requiring the library to redefine and readvertise the volunteer coordinator position was the only way for Crabtree and other applicants to demonstrate their qualifications for the job.

The Public Employers' Response

In light of the supreme court decision in Crabtree, public employers were forced to revise their hiring practices.

The Personnel Division of the Department of Administration took the lead by issuing informal guidelines on July 6, 1983, for use by executive branch agencies in applying employment preference. These guidelines served as an interim measure to assist state agencies until the Division issued formal rules on September 29, 1983. The Division's rules addressed such subjects as entitlement to preference, ranking preferred people, documentation of preference eligibility, application of preference, and recruitment and selection procedures.

They specifically provided that the preference applied to initial appointment only, not to promotions, transfers, or retention during or rehiring after reductions in the work force. The rules also permitted an agency, when it has qualified employees available, to limit recruitment to the agency, the division, or other internal unit.

On July 12, 1983, the Merit System Council met to examine its rules in relation to the Crabtree decision. The three-member Council appointed by the Governor was responsible for establishing employment policies for workers employed by state agencies receiving federal funds. At this meeting, the Council suspended those rules that were obviously in conflict with the supreme court ruling. The Council then reviewed the Personnel Division's interim guidelines and adopted the guidelines, with one exception, until the Merit System rules could be rewritten in compliance with Crabtree. The exception involved guideline no. 8, applying the preference to initial hiring only. The Council voted to expand this guideline to apply the preference to promotions and layoffs as well as to initial appointments.

The conflicting interpretations of the preference law by the Personnel Division and the Merit System Council were a source of confusion for state government, especially for those agencies employing some workers who were covered by the Merit System and others who were not. On July 18, 1983, the Council notified Merit System agencies that they must extend employment preference to promotions and layoffs. Two weeks later, the Personnel Division sent a letter to these same agencies seeking their cooperation in confining the

application of the preference to initial employment only until a final legal resolution of the issue was achieved.

In August 1983, the Rehabilitative Services Division of the Department of Social and Rehabilitation Services (SRS) issued a formal policy for certifying disabled persons for employment preference. The certification procedure outlined in the policy involved: (1) an interview with the disabled person by a counselor of a rehabilitation division regional office; (2) a recommendation by the counselor either for or against certification; (3) review of the counselor's recommendation by a physician retained by SRS; (4) review of the counselor's and physician's recommendations by the administrator of the Rehabilitative Services Division in Helena; and (5) issuance of a letter certifying or refusing to certify the applicant.

While state agencies concentrated on rules and procedures for applying the employment preference under the supreme court's decision, several lawsuits were filed alleging that the state had erroneously applied the preference prior to the court ruling. Several state agencies, including the Departments of Commerce, Highways, and Labor and Industry and the Office of the Clerk of the Supreme Court, were named as defendants in this litigation.

III. SUBCOMMITTEE DELIBERATIONS

As noted in the previous section, several events (e.g., issuance of the supreme court decision in Crabtree, adoption of agency rules and procedures, filing of lawsuits against the state) kept the employment preference controversy alive following adjournment of the 1983 Legislature in April. Amid this growing interest in the preference law, Joint Interim Subcommittee No. 4 began its work in September 1983. The Subcommittee finalized its recommendations in December of that year. The following section summarizes the Subcommittee's deliberations and related events. A more detailed account of Subcommittee action can be found in the meeting minutes available through the Legislative Council, Research Division, Room 104, State Capitol, Helena, Montana 59620.

Meeting #1: Organizational Session

The Subcommittee met for the first time on September 9, 1983, to organize for the interim. After members elected a chairman and vice-chairman, staff presented a background report on employment preference and reviewed a proposed study plan and meeting schedule. The study plan listed dozens of policy questions for the Subcommittee's consideration; the meeting schedule suggested that the Subcommittee address these questions in four meetings beginning in January 1984 and ending in July 1984. Following the staff's presentations, the members heard nearly 3 hours of testimony on the impact of the supreme court's Crabtree decision. The array of public comments demonstrated the complexity of the issues surrounding employment preference. Some witnesses urged the Subcommittee to advance its meeting

schedule so that the Subcommittee would be prepared if a special legislative session were called; others advised the Subcommittee to move cautiously to ensure a thorough examination of the issues before making recommendations. The Subcommittee, recognizing the need for ample time to collect the data necessary to make informed decisions, opted for the slower approach and set the next meeting for January 1984.

However, the Subcommittee was forced to reconsider its meeting schedule as state and local governments began feeling the repercussions of the Crabtree decision. Reports from government officials indicated that more than 90% of all state positions available since the Supreme Court ruling had been filled by preference-eligible candidates. The number of lawsuits alleging improper application of the preference law continued to mount, making public employers potentially liable for several million dollars in damages. In addition, another district court opinion, Jensen v. St. (Dist. Ct. Eighth Jud. Dist., BDU-83-706, Oct. 6, 1983, Roth, J.) expanded the Crabtree decision; the court in Jensen ruled that the Crabtree decision was retroactive, that the preference applied to promotions as well as to initial hirings, and that a remedy available to an unsuccessful job candidate who was denied preference was appointment to the position plus back pay. Moreover, a number of state officials, including the Speaker of the House of Representatives and Superintendent of Public Instruction, began calling for a special session of the Legislature to resolve the preference controversy. The Governor indicated that he would be willing to call a special session if the Subcommittee could reach a consensus on revisions to the law.

In light of these events, the Subcommittee agreed to meet in early December in preparation for a January or February special session. But the Subcommittee was again forced to advance its schedule when the Governor, following a meeting with legislative leaders, scheduled the opening date of a special session on employment preference for December 12, 1983. The Subcommittee then set its next meeting date for November.

Meeting #2: Preliminary Recommendations

The purpose of the 2-day meeting on November 18 and 19, 1983, was to solicit public testimony on employment preference and to develop preliminary recommendations. Before the meeting, a 12-page policy issues and options checklist was mailed to interested persons who were asked to indicate at the November meeting which options they favored for modifying the preference law.

The meeting was well attended by state and local government officials and representatives of veterans', handicapped, women's, and labor organizations. Over 70 people addressed the Subcommittee, and several others submitted written testimony but did not appear. There seemed to be little consensus among the groups concerning changes to the preference law; recommendations ranged from repeal of the statute to retaining an absolute preference for certain persons.

After hours of testimony and lengthy Subcommittee discussions, members voted to incorporate the following provisions into a preliminary bill draft:

> Purpose. The purpose of employment preference for veterans is reward and

rehabilitation. The purpose of employment preference for disabled civilians is rehabilitation and recognition for past discrimination.

Eligible persons. The following persons are eligible for employment preference: (1) a veteran certified by the U.S. Veterans Administration as having at least a 30% service-connected disability regardless of whether the disability was obtained in time of war or peace; (2) an honorably separated veteran who served during time of war or declared national emergency or who served on active duty in a military expedition in which a campaign ribbon was authorized; (3) an unremarried surviving spouse of a veteran whose death was service-connected; (4) a spouse of a veteran with 100% service-connected disability who is unable to use the employment preference; and (5) a disabled civilian certified by the Department of Social and Rehabilitation Services as having a physical or mental handicap.

The following persons are ineligible for employment preference: (1) a veteran receiving a military retirement allowance; (2) a member of the National Guard, reserves, or ROTC; and (3) a veteran's dependent.

Nature of preference. The preference is relative in nature. If two persons are substantially equally qualified for a position, the public employer must hire the

applicant with employment preference. Regardless of the selection process used (scored or unscored procedures), the burden rests with the public employer to justify his actions if challenged by an unsuccessful applicant.

Disabled veterans must be given preference over other preference-eligible persons.

Duration. A nondisabled veteran is entitled to use his or her preference within 10 years after separation from service or within 10 years after the effective date of the act, whichever is later. A disabled veteran, the spouse of a 100% disabled veteran who is unable to use the preference, and a disabled civilian may use his or her preference for as long as the disability exists. An unremarried surviving spouse of a veteran whose death was service-connected may use the preference for life. Within these time limits, the preference may be used an unlimited number of times.

Eligibility requirements. A preferred person must: (1) be a U.S. citizen; (2) have resided in the state for at least 1 year immediately before applying for employment; and (3) if applying for a city or county job, have been a resident of that city or town for at least 30 days before applying for employment.

Covered employers. The employment preference applies to: (1) all branches of state

government (executive, legislative, and judicial); (2) the university system; (3) cities, towns, and counties; and (4) special purpose districts.

The preference does not apply to: (1) school districts; (2) community colleges; and (3) public works contracts.

Covered positions. The employment preference applies to most permanent and seasonal positions. The preference does not apply to temporary positions and to permanent positions held by: (1) state and local elected officials; (2) secretaries, administrative, legislative or other immediate or first-line aides of these elected officials; (3) legal advisors of these elected officials; (4) members of boards, commissions, or councils appointed by these elected officials; (5) other officials appointed by these elected officials when the appointment is provided for by law; and (6) department heads appointed by the governor and executive department heads appointed by local government officials.

Covered employment situations. The preference applies to initial hirings only. The preference does not apply to promotions, transfers, reductions in force, or any other employment situation.

Available remedies. If a court finds that a public employer has failed to properly apply

the employment preference law, the judge may require the employer to reopen the selection process. An unsuccessful applicant for a position who brings suit against the employer shall receive attorney fees and court costs if the court orders the selection process reopened, but he is not entitled to back wages if selected during the reopened selection process.

Statute of limitation. An unsuccessful applicant for a position who is entitled to preference may, within 30 days after receiving notice that he did not get the job, request the employer to provide a written explanation as to why the applicant was not hired. The employer must submit the explanation to the applicant within 15 days of the date of the applicant's request for the explanation. Within 60 days after receiving the explanation, the applicant may file a petition in district court. The judge must order the employer to appear in court not less than 10 or more than 30 days after receipt of the court order to show cause why the applicant was not hired.

Rulemaking authority. The Departments of Administration and Social and Rehabilitation Services must adopt rules for implementing the preference.

A copy of the bill incorporating the above provisions (LC 1) is contained in Appendix B.

Meeting #3: Final Recommendations

The Subcommittee met December 9 and 10, 1983, to conduct a hearing on the proposed legislation (LC 1) and to take final action on the bill. About 20 people voiced their support for or opposition to the bill; many suggested revisions in certain provisions. The Subcommittee made the following amendments to LC 1:

1. Eligible persons (sections 3(3), 3(4), and 3(10)(b)): (1) Added spouses of MIAs, POWs, and handicapped persons determined to be 100% disabled to preference-eligible spouses;

   (2) excluded mentally impaired persons from preference-eligible handicapped persons; and

   (3) excluded persons receiving retirement pay from the United States government based on length of military service from preference-eligible veterans.

2. Covered employers (section 3(7)): (1) Required vocational-technical centers or programs and community colleges to apply preference by including them in the definition of "public employer"; and

   (2) exempted special purpose districts from applying the preference by specifically excluding them in the definition of "public employer".

3. Certification by Department of Social and Rehabilitation Services (new section 6): Gave SRS the authority to certify persons as handicapped for the purpose of employment preference.

4. Duration (renumbered section 7): (1) Permitted a handicapped person, the eligible spouse of a handicapped person, a disabled veteran, and the eligible spouse of a disabled veteran to use the preference for as long as the disabling condition exists;

(2) permitted a nondisabled veteran to use the preference for life; however, once he has obtained a position because of the application of employment preference, he may not use the preference again;

(3) permitted the surviving spouse of a veteran who died while on active duty to use the preference for as long as the spouse remains unmarried; and

(4) permitted the spouse of an MIA or POW to use the preference for as long as the person is missing in action or a prisoner of war.

5. Enforcement/notice of preference (renumbered section 8(1)): Required employer to post notice of the preference and to give notice of the preference on the employment application form.

6. Enforcement/filing petition (renumbered section 8(4)(b)): Required filing of petition in district court in the county in which the employment application was received by the employer.

7. Enforcement/remedy (renumbered section 8(4)(c)(iii)): Inserted "court" before "costs".

8. Amendments to current law (new sections 11, 12, and 13): Sections 10-2-402, 49-3-103, and 49-3-201, MCA, were amended to eliminate conflicts between these statutes and the proposed act.

9. Applicability (renumbered section 16): Provided that the act applies only to positions filled after the effective date of the act.

10. Savings clause (renumbered section 16): Provided that a claim for violation under the old law (10-2-201 through 10-2-206, MCA) must be filed within 60 days after the effective date of the act; such claim is governed by the provisions of the old law, but the only relief that may be granted is the relief outlined in section 7 of the bill (reopening selection process and granting of attorney fees and court costs.)

The Subcommittee agreed to recommend LC 1 as amended above for consideration during the special session. In addition, members adopted a statement of legislative intent to be attached to the bill. The statement addressed the nature of the employment preference granted in the bill and also discussed the contents of the rules to be adopted by the Department of Administration for implementing the preference. A copy of the statement of intent is contained in Appendix C.

IV. BILL SUMMARY

On December 12, 1983, Subcommittee No. 4 submitted its bill (LC 1) for consideration by the 48th Legislature meeting in special session to resolve the employment preference controversy. The Subcommittee decided to simultaneously introduce the same version of its bill in the House and Senate to permit both houses to begin working on the proposal on the first day of the session. The bills were numbered Senate Bill No. 2 (SB 2) and House Bill No. 8 (HB 8) and were assigned to the Senate and House Judiciary Committees respectively. Below is a section-by-section summary of SB 2. A copy of the bill as introduced is contained in Appendix D.

Section 1. (Short title). This act is called the "Montana Veterans' and Handicapped Persons' Employment Preference Act".

Section 2. (Purposes). The purpose of granting employment preference to veterans is to reward and to rehabilitate, while the purpose for handicapped persons is to recognize past employment discrimination and to rehabilitate.

Section 3. (Definitions). This section identifies the following groups as preference-eligible:

1. Disabled veterans. Those persons who:

   -- served on active duty;

   -- have been separated from service under honorable conditions; and

-- suffer a service-connected disability of 30% or more as determined by the U.S. Veterans Administration.

2. Veterans. Those persons who:

-- served on active duty during war or declared national emergency or in a campaign or expedition for which a campaign badge was authorized; and

-- have been separated from service under honorable conditions.

3. Eligible spouses. Those persons who are:

-- unremarried surviving spouses of veterans who died while on active duty or whose death resulted from service-connected disabilities;

-- spouses of veterans determined by the Veterans Administration to have 100% service-connected disabilities who are unable to use their employment preference because of their disabilities;

-- spouses of persons determined by the U.S. government to be missing in action or prisoners of war; and

-- spouses of handicapped persons determined by SRS to have 100% disabilities who are unable to use their

employment preference because of their disabilities.

4. Handicapped persons. Those persons who:

-- have a physical impairment limiting one or more major life activities and limiting ability to obtain, retain, or advance in employment; and

-- are certified by SRS.

The definition section also gives a detailed explanation of what "initial hiring" means, identifies those positions covered by preference and those employers who must apply the preference, and defines the term "substantially equal qualifications".

Section 4. (Employment preference in initial hiring). This section describes the nature of the employment preference. It provides that for initial hiring only, a public employer must hire a preference-eligible applicant over any nonpreferred applicant holding substantially equal qualifications. Moreover, an employer must hire a disabled veteran over any other preferred applicant with substantially equal qualifications.

Section 5. (Eligibility requirements). No veteran (nondisabled or disabled), eligible spouse, or handicapped person may receive preference unless he:

-- is a U.S. citizen;

-- meets a 1-year state residency requirement;

-- meets a 30-day local residency requirement if applying for a municipal or county job; and

-- meets the requirements necessary to perform the job.

Section 6. (Certification of handicapped persons). This section requires SRS to certify persons as handicapped for the purpose of employment preference.

Section 7. (Duration of preference). This section provides that:

-- A handicapped person, eligible spouse of a handicapped person, disabled veteran, and eligible spouse of a disabled veteran may use the preference for as long as the disabling condition exists;

-- A nondisabled veteran may use the preference for life, but once he has obtained a job because of application of the preference, he may not use the preference again;

-- A surviving spouse of a veteran whose death was service-connected may use the preference for as long as the spouse remains unmarried; and

-- A spouse of a person who is an MIA or POW may use the preference for as long as the person is missing in action or a prisoner of war.

Section 8. (Enforcement of preference). The enforcement procedures for the act are as follows:

-- A public employer must inform job applicants of the existence of the preference.

-- An applicant who feels that he is entitled to preference must claim the preference in writing before the filing deadline for applications passes.

-- If any of the applicants for a job claim preference, the employer must send each applicant a written notice of his hiring decision.

-- Within 30 days after receiving the notice, an unsuccessful applicant who is preference-eligible may ask the employer for an explanation of his hiring decision.

-- The employer must respond within 15 days after receiving the request for the explanation.

-- An applicant may also file a petition in district court within 90 days after receiving notice of the hiring decision.

-- Once a petition is filed, the judge must order the employer to appear in court not less than 10 days or more than 30 days after the petition was filed to show cause why the applicant was not hired for the position.

-- If the employer cannot make a clear showing that the applicant was not substantially equally qualified with the person hired, the judge must order the employer to reopen the selection process for the position and to pay attorney fees and court costs.

Section 9. (Adoption of rules.) This section grants rulemaking authority to the Department of Administration. The department must adopt rules for implementing the act and must consult with SRS before adopting rules governing certification of handicapped persons. Rules adopted by the Department of Administration apply to all state and local public employers.

Section 10. (Conflicts with federal law). This section provides that if application of the preference conflicts with federal laws or regulations concerning certain work or jobs, the preference will not be applied.

Sections 11, 12, and 13. (Amendments to existing law). These sections amend 10-2-402, 49-3-103, and 49-3-201, MCA, to eliminate conflicts between current law and the preference act.

Section 14. (Repealer.) This section repeals the old preference law (10-2-201 through 10-2-206, MCA).

Section 15. (Severability.) This section provides that if a court finds any part of this act unconstitutional or invalid, only such part is void; the remainder of the act is valid.

Section 16. (Effective date -- applicability -- saving clause). This section provides that:

-- the act is effective on passage and approval;

-- the act applies only to positions filled after the effective date; and

-- a claim for violation under the old law (10-2-201 through 12-2-206, MCA) must be filed within 60 days after the effective date of the act; such claim is governed by the provisions of the old law but the only relief that may be granted is the relief outlined in section 8 of the act (reopening selection process and granting of attorney fees and court costs).

V. CONCLUSION

Due in large part to Subcommittee No. 4's success in reaching a reasonable compromise for addressing the controversial employment preference law, the December special session lasted only 6 days (December 12 through 17, 1983). In addition to the Subcommittee's proposal (SB 2 and HB 8), nine other preference bills were considered. The only bill enacted was SB 2. The House voted 66-33 in favor of its passage; the Senate vote was 35-15. The Governor signed the bill into law on December 20, 1983. The Code Commissioner then codified the act as 39-30-101 through 39-30-207, MCA.

The basic provisions of SB 2 as drafted by the Subcommittee remained intact during the special session; the Legislature agreed that the preference should be a relative one applied among two or more applicants having substantially equal qualifications. However, the Legislature did make some amendments to SB 2. The following is a listing of the major amendments made to the bill:

> Section 3(2)(b) and 3(9)(a)(ii). Among veterans and disabled veterans, the Legislature limited the preference to those who received honorable discharges. (SB 2 as introduced extended preference to veterans separated from service under honorable conditions; this provision would have made persons receiving general, as well as honorable, discharges eligible for preference.)

Section 3(4) and 3(11). Handicapped persons suffering from a mental impairment were made eligible for preference. (SB 2 as introduced gave preference only to handicapped persons with physical impairments.)

Section 3(7)(b). Universities, the Board of Regents of Higher Education, community colleges, and postsecondary vocational-technical educational centers were exempted from applying the preference. (As introduced, SB 2 required these institutions to apply the preference.)

Section 4(1)(b). The Legislature required public employers to give handicapped persons, along with disabled veterans, preference over all other preference-eligible applicants with substantially equal qualifications. (As introduced, SB 2 required that only disabled veterans be preferred above the preference-eligible.)

Section 7(2). The Legislature altered the duration of the preference for a veteran who is not disabled by providing that such veteran qualifies for preference for no longer than 15 years after separation from service or for no longer than 5 years after the effective date of the act (December 20, 1983), whichever is later. (SB 2 as introduced gave the veteran preference for life; however, once he obtained a position because of the application of the preference, he could not use the preference again.)

Section 8(4)(c)(i). The Legislature changed the burden of proof required by a public employer if an unsuccessful applicant files a petition in district court. Under this change, an employer must prove by a preponderance of the evidence that the petitioner and the person hired were not substantially equally qualified. (SB 2 as introduced required the employer to make a clear showing that the petitioner was not substantially equally qualified with the person hired.)

Sections 12 and 13. Two new sections were added stating that the application of the preference may not be construed to constitute a violation of the Montana Human Rights Act or the Governmental Code of Fair Practices. The amendments to 49-3-103 and 49-3-201 were removed from the bill. (As introduced, SB 2 amended 49-3-103 and 49-3-201 to eliminate conflicts between the fair practices code and the preference statutes.)

Section 14. The Legislature revised the repealer section providing that the repeal of the old preference statutes (10-2-201 through 10-2-206, MCA) applies retroactively to bar any claim of violation or application of the old law that has not been reduced to judgment as of December 20, 1983, the effective date of the act. Any claim under the old act that has been reduced to judgment as of December 20, 1983, is enforceable. (SB 2 as introduced required a claim under the old law

to be filed within 60 days after the effective date of the act and provided that the claim is governed by the provisions of the old law but that the only relief that could be granted is reopening the selection process and granting of attorney fees and court costs.)

The final version of SB 2 (reference bill) containing the Legislature's revisions can be found in Appendix E.

APPENDIX A

VETERANS' AND DISABLED CIVILIANS' EMPLOYMENT PREFERENCE STATUTES

(10-2-201 THROUGH 10-2-206, MCA)

REPEALED. SEC. 14, CH. 1, Sp. L. 1983

10-2-201. Purpose. The purpose of 10-2-201 through 10-2-206 is to provide for preference of veterans, their dependents and unremarried surviving spouses, and certain disabled civilians in appointment and employment in every public department and upon all public works of the state of Montana and of any county and city thereof.

History: En. Sec. 1, Ch. 211, L. 1921; re-en. Sec. 5653, R.C.M. 1921; amd. Sec. 1, Ch. 133, L. 1927; re-en. Sec. 5653, R.C.M. 1935; amd. Sec. 1, Ch. 66, L. 1937; amd. Sec. 1, Ch. 160, L. 1943; amd. Sec. 1, Ch. 223, L. 1947; amd. Sec. 1, Ch. 26, L. 1949; amd. Sec. 1, Ch. 120, L. 1955; amd. Sec. 1, Ch. 193, L. 1969; amd. Sec. 38, Ch. 535, L. 1975; amd. Sec. 4, Ch. 49, L. 1977; R.C.M. 1947, 77-501(1).

10-2-202. Definitions. For purposes of 10-2-201 through 10-2-206, the following definitions apply:

(1) The term "veterans" means persons:

(a) who served in the armed forces of the United States in time of war or declared national emergency and who have been separated from service upon conditions other than dishonorable; or

(b) who after January 31, 1955:

(i) served on active military duty for more than 180 days or were discharged or released because of a service-connected disability; and

(ii) were honorably discharged.

(2) The term "war or declared national emergency" includes:

(a) The Civil War;

(b) The Spanish-American War;

(c) The Philippine insurrection;

(d) World War I, between April 6, 1917, and November 11, 1918, both dates inclusive;

(e) World War II, between September 16, 1940, and December 31, 1946, both dates inclusive;

(f) The Korean conflict, military expedition, or police action, between June 26, 1950, and January 31, 1955, both dates inclusive; and

(g) The Vietnam conflict between August 5, 1964, and May 7, 1975, both dates inclusive.

(3) The term "surviving spouse" means an unremarried surviving spouse of a veteran.

(4) The word "percent" means percent of the total aggregate points of the examination referred to.

History: En. Sec. 1, Ch. 211, L. 1921; re-en. Sec. 5653, R.C.M. 1921; amd. Sec. 1, Ch. 133, L. 1927; re-en. Sec. 5653, R.C.M. 1935; amd. Sec. 1, Ch. 66, L. 1937; amd. Sec. 1, Ch. 160, L. 1943; amd. Sec. 1, Ch. 223, L. 1947; amd. Sec. 1, Ch. 26, L. 1949; amd. Sec. 1, Ch. 120, L. 1955; amd. Sec. 1, Ch. 193, L. 1969; amd. Sec. 38, Ch. 535, L. 1975; amd. Sec. 4, Ch. 49, L. 1977; R.C.M. 1947, 77-501(2); amd. Sec. 1, Ch. 142, L. 1979; amd. Sec. 1, Ch. 5, L. 1981.

Compiler's Comments

1981 Amendment: Deleted "including but not limited to those veterans serving because of the Vietnam conflict" in (1)(b)(i); added subsection (2)(g).

10-2-203. Preference in appointment and employment. (1) In every public department and upon all public works of the state of Montana and of any county or city thereof, the following shall be preferred for appointment and employment: veterans, their spouses and surviving spouses, and the other dependents of disabled veterans and disabled civilians recommended by the rehabilitative services division of the department of social and rehabilitation services.

(2) Age, loss of limb, or other physical impairment which does not in fact incapacitate does not disqualify any disabled veteran or civilian provided he or she possesses the business capacity, competency, and education to discharge the duties of the position involved.

(3) Those of the above-described veterans who have disabilities admitted by the veterans administration of the United States to have been incurred in service in any of the wars, military expeditions, or police actions, whenever such disabilities do not in fact incapacitate, shall be given preference in employment over other veterans.

History: En. Sec. 1, Ch. 211, L. 1921; re-en. Sec. 5653, R.C.M. 1921; amd. Sec. 1, Ch. 133, L. 1927; re-en. Sec. 5653, R.C.M. 1935; amd. Sec. 1, Ch. 66, L. 1937; amd. Sec. 1, Ch. 160, L. 1943; amd. Sec. 1, Ch. 223, L. 1947; amd. Sec. 1, Ch. 26, L. 1949; amd. Sec. 1, Ch. 120, L. 1955; amd. Sec. 1, Ch. 193, L. 1969; amd. Sec. 38, Ch. 535, L. 1975; amd. Sec. 4, Ch. 49, L. 1977; R.C.M. 1947, 77-501(3).

10-2-204. Credit for examination. (1) When written or oral examinations are required for employment, disabled veterans and their spouses, their surviving spouses, and other dependents shall have added to their examination ratings a credit of 10 points. All other veterans, their spouses, surviving spouses, and dependents shall have added to their examination ratings a credit of 5 points.

(2) The fact that an applicant has claimed a veterans' credit may not be made known to the examiners until ratings of all applicants have been recorded, after which such credits shall be added to the examination rating and the records shall show the examination rating and the veteran's credit.

(3) The benefits of this section are in addition to and not in derogation of the preference in appointment and employment or both given by 10-2-203.

History: En. Sec. 1, Ch. 211, L. 1921; re-en. Sec. 5653, R.C.M. 1921; amd. Sec. 1, Ch. 133, L. 1927; re-en. Sec. 5653, R.C.M. 1935; amd. Sec. 1, Ch. 66, L. 1937; amd. Sec. 1, Ch. 160, L. 1943; amd. Sec. 1, Ch. 223, L. 1947; amd. Sec. 1, Ch. 26, L. 1949; amd. Sec. 1, Ch. 120, L. 1955; amd. Sec. 1, Ch. 193, L. 1969; amd. Sec. 38, Ch. 535, L. 1975; amd. Sec. 4, Ch. 49, L. 1977; R.C.M. 1947, 77-501(4).

10-2-205. Eligibility. (1) None of the benefits of 10-2-201 through 10-2-206 accrue to any person who refused to serve on active duty in the military service to which attached or to take up arms in the defense of the United States.

(2) No person who has not been a resident of Montana for at least 1 year immediately preceding an appointment is entitled to such preference.

(3) For city or county employment, no preference will be granted unless an applicant under 10-2-201 through 10-2-206 is also a resident of the city or town or county in which employment is sought.

History: En. Sec. 1, Ch. 211, L. 1921; re-en. Sec. 5653, R.C.M. 1921; amd. Sec. 1, Ch. 133, L. 1927; re-en. Sec. 5653, R.C.M. 1935; amd. Sec. 1, Ch. 66, L. 1937; amd. Sec. 1, Ch. 160, L. 1943; amd. Sec. 1, Ch. 223, L. 1947; amd. Sec. 1, Ch. 26, L. 1949; amd. Sec. 1, Ch. 120, L. 1955; amd. Sec. 1, Ch. 193, L. 1969; amd. Sec. 38, Ch. 535, L. 1975; amd. Sec. 4, Ch. 49, L. 1977; R.C.M. 1947, 77-501(5).

10-2-206. Enforcement of preference. Any person entitled to preference in 10-2-201 through 10-2-206 who has applied for any appointment or employment upon public works of the state of Montana or any county and city thereof or in any public department of the state and who has been denied employment or appointment and feels that the spirit of 10-2-201 through 10-2-206 has been violated and that such person is in fact qualified physically and mentally and possesses business capacity, competency, and education to discharge the duties of the position applied for may petition by verified petition the district court of the state of Montana in the county in which the work is to be performed. The petition shall set forth the facts of the application, qualifications, competency, and such person's honorable discharge or other qualifications warranting the applicant to preference under 10-2-201 through 10-2-206. Upon filing of such petition, any judge in the court shall issue an order to show cause to the appointing authority directing the appointing authority to appear in the court at a specified time and place, not less than 5 or more than 10 days after the filing of the verified petition, to show cause, if any exists, why the veteran or person entitled to preference should not be employed by the appointing authority. The district court has jurisdiction upon the proper showings to issue its order directing and ordering the appointing authority to comply with this law in giving the preference provided for.

History: En. Sec. 1, Ch. 211, L. 1921; re-en. Sec. 5653, R.C.M. 1921; amd. Sec. 1, Ch. 133, L. 1927; re-en. Sec. 5653, R.C.M. 1935; amd. Sec. 1, Ch. 66, L. 1937; amd. Sec. 1, Ch. 160, L. 1943; amd. Sec. 1, Ch. 223, L. 1947; amd. Sec. 1, Ch. 26, L. 1949; amd. Sec. 1, Ch. 120, L. 1955; amd. Sec. 1, Ch. 193, L. 1969; amd. Sec. 38, Ch. 535, L. 1975; amd. Sec. 4, Ch. 49, L. 1977; R.C.M. 1947, 77-501(6).

APPENDIX B

LC 1

DRAFT COPY
SUBJECT TO REVISIONS

_____ BILL NO. _____

INTRODUCED BY _____

BY REQUEST OF THE JOINT INTERIM SUBCOMMITTEE NO. 4

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING PREFERENCE IN PUBLIC EMPLOYMENT FOR CERTAIN MILITARY VETERANS, THEIR ELIGIBLE SPOUSES, AND HANDICAPPED PERSONS; REPEALING SECTIONS 10-2-201 THROUGH 10-2-206, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND AN APPLICABILITY DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Short title. [Sections 1 through 9] may be cited as the "Montana Veterans and Handicapped Persons Employment Preference Act".

Section 2. Purposes. The purposes of [sections 1 through 9] are to reward veterans for service to their country, recognize past employment discrimination against handicapped persons, and facilitate the habilitation, rehabilitation, and readjustment of veterans and handicapped persons.

Section 3. Definitions. For the purposes of [sections 1 through 9], the following definitions apply:

(1) "Active duty" means full-time duty other than for training in the regular components of the United States army, air force, navy, marine corps, or coast guard with

full pay and allowances. The term does not include monthly drills, summer encampments, initial training, or other inactive or active duty for training in the national guard or reserves.

(2) "Disabled veteran" means an individual who:

(a) served on active duty;

(b) has been separated from service under honorable conditions; and

(c) suffers a service-connected disability determined by the United States veterans administration to be 30% or more disabling.

(3) "Eligible spouse" means:

(a) the unremarried surviving spouse of a veteran who died while on active duty or whose death resulted from a service-connected disability; or

(b) the spouse of a veteran determined by the United States veterans administration to have a 100% service-connected disability who is unable to use his employment preference because of his disability.

(4) "Handicapped person" means an individual certified by the department of social and rehabilitation services to have a physical or mental impairment that substantially limits one or more major life activities, such as writing, seeing, hearing, speaking, or mobility, and which limits the individual's ability to obtain, retain, or advance in

employment.

(5) (a) "Initial hiring" means a personnel action for which applications are solicited from outside the ranks of the current employees of:

(i) a department, as defined in 2-15-102, for a position within the executive branch;

(ii) a legislative agency, such as the consumer counsel, environmental quality council, office of the legislative auditor, legislative council, or office of the legislative fiscal analyst, for a position within the legislative branch;

(iii) a judicial agency, such as the office of supreme court administrator, office of supreme court clerk, state law library, and similar offices in the state district courts for a position within the judicial branch;

(iv) a unit, as defined in 20-25-201, for a position within the Montana university system;

(v) the office of commissioner of higher education for a position within that office;

(vi) a city or town for a municipal position, including a city or municipal court position;

(vii) a county for a county position, including a justice's court position; and

(viii) any other political subdivision of the state not staffed by employees of a city, town, or county for a

position with that political subdivision.

(b) A personnel action limited to current employees of a specific public entity identified in subsections (a)(i) through (a)(viii) of this subsection (5), current employees in a reduction-in-force pool who have been laid off from a specific public entity identified in subsections (a)(i) through (a)(viii) of this subsection (5), or current participants in a federally authorized employment program is not an initial hiring.

(6) "Position" means a permanent position as defined in 2-18-101(10) or a seasonal position as defined in 2-18-101(15). However, the term does not include:

(a) a temporary position as defined in 2-18-101(16);

(b) a state or local elected official;

(c) employment as an elected official's immediate secretary, legal advisor, or administrative, legislative, or other immediate or first-line aide;

(d) appointment by an elected official to a body such as a board, commission, committee, or council;

(e) appointment by an elected official to a public office if the appointment is provided for by law;

(f) a department head appointment by the governor or an executive department head appointment by a mayor, city manager, county commissioner, or other chief administrative or executive officer of a local government; or

(g) engagement as an independent contractor or employment by an independent contractor.

(7) "Public employer" means:

(a) any department, office, board, bureau, commission, agency, college, university, or other instrumentality of the executive, judicial, or legislative branch of the government of the state of Montana except a community college; and

(b) any county, city, town, or other political subdivision of the state except a school district.

(8) "Substantially equal qualifications" means the qualifications of two or more persons among whom the public employer cannot make a reasonable determination that the qualifications held by one person are significantly better suited for the position than the qualifications held by the other persons.

(9) "Under honorable conditions" means a discharge or separation from active duty characterized as under honorable conditions. The term includes honorable discharges and general discharges but does not include dishonorable discharges or other administrative discharges characterized as other than honorable.

(10) (a) "Veteran" means a person who:

(i) served on active duty during time of war or declared national emergency or in a campaign or expedition for which a campaign badge was authorized by the United

States congress or the United States department of defense; and

(ii) has been separated from service under honorable conditions.

(b) The term does not include a retired member of the United States armed forces who is receiving a military retirement allowance other than a disability allowance.

(11) "War or declared national emergency" means:

(a) World War I, beginning on April 6, 1917, and ending on November 11, 1918, both dates inclusive;

(b) World War II, beginning on December 7, 1941, and ending on December 31, 1946, both dates inclusive;

(c) the Korean conflict, military expedition, or police action, beginning on June 27, 1950, and ending on January 31, 1955, both dates inclusive; and

(d) the Vietnam conflict, beginning on August 5, 1964, and ending on May 7, 1975, both dates inclusive.

Section 4. Employment preference in initial hiring. (1) (a) In an initial hiring for a position, if a job applicant who is a veteran, disabled veteran, eligible spouse, or handicapped person meets the eligibility requirements contained in [section 5] and claims a preference as required by [section 7], a public employer shall hire the applicant over any other applicant with substantially equal qualifications who is not a preference

eligible applicant.

(b) In an initial hiring, a public employer shall hire a disabled veteran over any other preference eligible applicant with substantially equal qualifications.

(2) The employment preference provided for in subsection (1) does not apply to a personnel action described in subsection (5)(b) of [section 3] or to any other personnel action that is not an initial hiring.

Section 5. Eligibility requirements. No veteran, disabled veteran, eligible spouse, or handicapped person is entitled to receive employment preference as provided in [section 4] unless:

(1) he is a United States citizen;

(2) he has resided continuously in the state for at least 1 year immediately before applying for employment;

(3) if applying for municipal or county employment, he has resided for at least 30 days immediately before applying for employment in the city, town, or county in which employment is sought; and

(4) he meets those requirements considered necessary by a public employer to successfully perform the essential duties of the position for which he is applying.

Section 6. Duration of employment preference. Subject to [section 5]:

(1) a handicapped person, a disabled veteran, or the

spouse of a disabled veteran as described in subsection (3)(b) of [section 3] qualifies for employment preference as long as the disabling condition exists;

(2) a veteran, as defined in [section 3], who is not a disabled veteran, as defined in [section 3], qualifies for employment preference for no longer than 10 years following separation from service or for no longer than 10 years following [the effective date of this act], whichever is later; and

(3) the surviving spouse of a veteran as described in subsection (3)(a) of [section 3] qualifies for employment preference for as long as the spouse remains unmarried.

Section 7. Enforcement of preference. (1) A public employer shall give notice of the preferences that [sections 1 through 9] provide in public employment either by posting or on the application form.

(2) A job applicant who believes he has an employment preference shall claim the preference in writing before the time for filing applications for the position involved has passed. Failure to make a timely employment preference claim is a complete defense to an action under subsection (4) of this section.

(3) If an applicant for a job makes a timely written employment preference claim, the public employer shall give written notice of its hiring decision to each applicant

claiming preference.

(4) (a) An applicant who believes he has not been accorded his rights under [sections 1 through 9] may, within 30 days of receipt of the notice of the hiring decision, submit to the public employer a written request for an explanation of the public employer's hiring decision. Within 15 days of receipt of the request, the public employer shall give the applicant a written explanation.

(b) The applicant may, within 90 days after receipt of notice of the hiring decision, file a petition in the district court in either the county in which the applicant resides or in the county in which his application was received by the public employer. The petition must state facts which on their face entitle the applicant to an employment preference.

(c) (i) Upon filing of the petition, the court shall order the public employer to appear in court at a specified time not less than 10 or more than 30 days after the day the petition was filed and show cause why the applicant was not hired for the position. The public employer has the burden of making a clear showing that the applicant was not substantially equally qualified with the person hired.

(ii) The time to appear provided in subsection (4)(c)(i) of this section may be waived by stipulation of the parties. If a time to appear has been specified pursuant

to subsection (4)(c)(i), the court may, on motion of one of the parties or on stipulation of all of the parties, grant a continuance.

(iii) If the public employer does not carry its burden of proof under subsection (4)(c)(i), the court shall order the public employer to reopen the selection process for the position involved and shall grant the applicant reasonable attorney fees and costs. The remedy provided by this section is the only remedy for a violation of [sections 1 through 9], and a court may not grant any other relief in an action for violation of [sections 1 through 9].

(d) Failure of an applicant to file a petition under subsection (4)(b) within 90 days bars the filing of a petition. If a public employer fails to provide an explanation under subsection (4)(a) within 15 days and a petition is filed under subsection (4)(b), the court shall order the public employer to reopen the selection process.

(e) The Montana Rules of Civil Procedure apply to a proceeding under this subsection (4) to the extent that they do not conflict with this subsection (4).

Section 8. Adoption of rules. The department of administration shall adopt rules implementing [sections 1 through 9] and shall consult with the department of social and rehabilitation services in adopting rules governing certification of handicapped persons for purposes of

[sections 1 through 9]. The department of administration's rules apply to all public employers, local as well as state.

Section 9. Conflicts with federal law. [Sections 1 through 9] do not apply to work or positions subject to federal laws or regulations if application of the employment preference conflicts with those laws or regulations.

Section 10. Repealer. Sections 10-2-201 through 10-2-206, MCA, are repealed.

Section 11. Severability. If a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

Section 12. Effective date -- applicability. (1) This act is effective on passage and approval.

(2) This act applies only to positions that become open for employment after the effective date of this act.

-End-

APPENDIX C

STATEMENT OF INTENT (LC 1)

Statement of Intent

_____ Bill No. _____ [LC 1]

A statement of intent is provided to address the nature of the employment preference granted in the bill. The legislature intends that public employers seek and hire the most qualified persons for positions in public employment. It is also the intent of the legislature that the nature of the preference is a relative one in that it is to be applied as a "tie-breaker" among two or more applicants for a position who have substantially equal qualifications. Substantially equal qualifications does not mean a situation in which two or more applicants are exactly equally qualified. It means a range within which two applicants must be considered to be substantially equal in view of the qualifications set for the job. Qualifications should include job-related knowledge, skill, and abilities. The legislature recognizes that public employers use a variety of scored and unscored selection procedures such as conventional written examinations, training and experience requirements, performance tests, structured oral interviews, or combinations of these. The legislature does not intend to specify the type of selection procedure to be used by a public employer.

A statement of intent is also required for this bill because section 9 requires the department of administration to adopt rules implementing sections 1 through 10 and to consult with the department of social and rehabilitation services in formulating rules for the certification of handicapped persons.

The legislature intends the rules to adequately provide for the administration of the employment preference law, but to include only those rules that are reasonably necessary to implement sections 1 through 10.

It is the desire of the legislature that the department take all necessary steps in formulating, proposing, and adopting rules to ensure that the public, particularly those persons and organizations that have shown past interest in the employment preference law, is afforded sufficient time and opportunity to participate in the rulemaking procedure. The department should give such notice and hold such hearings as will ensure adequate public participation.

Rules adopted by the department apply to all initial hirings to positions by all public employers. In formulating its rules the department should take this into consideration and adopt rules that can be used and applied by the broad spectrum of state and local public employers subject to sections 1 through 10.

It is the intent of the legislature that the department formulate and adopt rules relating, but not limited, to the following matters and take into account the following considerations.

(1) Claiming preference -- documentation and verification. Rules relating to the job application process should include the manner in which a preference should be claimed when a job is applied for. They should prescribe the means by which the applicant must document and submit evidence of such things as the applicant's status as a veteran, disabled veteran, handicapped

person, or eligible spouse, and the requisite residency and citizenship requirements. It is the intent of the legislature that rules for claiming and documenting a preference do not place unreasonable burdens upon applicants and that once an applicant has substantially complied with the rules, a public employer should make every reasonable attempt to verify the existence of the preference.

(2) Handicapped persons -- certification. The rules should provide that a person will not be denied handicapped status and certification merely because of his current or former employment, should address the matter of what constitutes a physical impairment that substantially limits one or more major life activities, and outline in what instances a physical impairment limits a person's ability to obtain, retain, or advance in employment. The department may wish to do this by a combination of a statement of general principles and specific examples.

Rules should provide for a certification process that allows, when appropriate, permanent certification of those impairments considered to be permanent in nature. A procedure for extension or loss of certification should be provided for those instances in which a handicap is or may be temporary.

(3) Military conflicts. The legislature intends the rules to apply federal law to determine what constitutes a campaign or expedition for which a campaign badge is authorized by the Congress of the United States or department of defense.

(4) Separations and discharges. The legislature intends the rules to apply federal law and further define separations under honorable conditions and the various types of discharges.

(5) Hiring decision notices and explanations. The legislature intends the rules to provide for the form and content of written notices of hiring decisions, including whether the position was obtained as the result of application of the preference by the public employer, written requests for explanations of hiring decisions, and written explanations of hiring decisions.

(6) Reopening of selection process. The legislature intends the rules to provide for a method of reopening the selection process for a job should a court order the selection process reopened, and include a method of giving notice to those who applied for the job informing them of the reopening and the reason therefor.

(7) Jobs subject to federal law. The legislature intends the rules to identify or provide a method of identifying work or positions to which the employment preference does not apply by virtue of section 10.

APPENDIX D

SENATE BILL NO. 2

(Introduced Bill)

SENATE BILL NO. 2

INTRODUCED BY MAZUREK

BY REQUEST OF THE JOINT INTERIM SUBCOMMITTEE NO. 4

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING PREFERENCE IN PUBLIC EMPLOYMENT FOR CERTAIN MILITARY VETERANS AND HANDICAPPED PERSONS AND THEIR ELIGIBLE SPOUSES; AMENDING SECTIONS 10-2-402, 49-3-103, AND 49-3-201, MCA; REPEALING SECTIONS 10-2-201 THROUGH 10-2-206, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND AN APPLICABILITY DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. Section 1. Short title. [Sections 1 through 10] may be cited as the "Montana Veterans and Handicapped Persons Employment Preference Act".

NEW SECTION. Section 2. Purposes. The purposes of [sections 1 through 10] are to reward veterans for service to their country, recognize past employment discrimination against handicapped persons, and facilitate the habilitation, rehabilitation, and readjustment of veterans and handicapped persons.

NEW SECTION. Section 3. Definitions. For the purposes of [sections 1 through 10], the following definitions apply:

(1) "Active duty" means full-time duty other than for training in the regular components of the United States army, air force, navy, marine corps, or coast guard with full pay and allowances. The term does not include monthly drills, summer encampments, initial training, or other inactive or active duty for training in the national guard or reserves.

(2) "Disabled veteran" means an individual who:

(a) served on active duty;

(b) has been separated from service under honorable conditions; and

(c) suffers a service-connected disability determined by the United States veterans administration to be 30% or more disabling.

(3) "Eligible spouse" means:

(a) the unremarried surviving spouse of a veteran who died while on active duty or whose death resulted from a service-connected disability; or

(b) the spouse of:

(i) a veteran determined by the United States veterans administration to have a 100% service-connected disability who is unable to use his employment preference because of his disability;

(ii) a person on active duty determined by the United States government to be missing in action or a prisoner of war; or

(iii) a handicapped person determined by the department

of social and rehabilitation services to have a 100% disability who is unable to use his employment preference because of his disability.

(4) "Handicapped person" means an individual certified by the department of social and rehabilitation services to have a physical impairment that substantially limits one or more major life activities, such as writing, seeing, hearing, speaking, or mobility, and which limits the individual's ability to obtain, retain, or advance in employment.

(5) (a) "Initial hiring" means a personnel action for which applications are solicited from outside the ranks of the current employees of:

(i) a department, as defined in 2-15-102, for a position within the executive branch;

(ii) a legislative agency, such as the consumer counsel, environmental quality council, office of the legislative auditor, legislative council, or office of the legislative fiscal analyst, for a position within the legislative branch;

(iii) a judicial agency, such as the office of supreme court administrator, office of supreme court clerk, state law library, or similar office in a state district court for a position within the judicial branch;

(iv) a unit, as defined in 20-25-201, for a position

within the Montana university system;

(v) the office of commissioner of higher education for a position within that office;

(vi) a college for a position within that college;

(vii) a center or program for a position within the postsecondary vocational-technical education system;

(viii) a city or town for a municipal position, including a city or municipal court position; and

(ix) a county for a county position, including a justice's court position.

(b) A personnel action limited to current employees of a specific public entity identified in subsections (a)(i) through (a)(ix) of this subsection (5), current employees in a reduction-in-force pool who have been laid off from a specific public entity identified in subsections (a)(i) through (a)(ix) of this subsection (5), or current participants in a federally authorized employment program is not an initial hiring.

(6) "Position" means a permanent or seasonal position as defined in 2-18-101 for a state position or a similar permanent or seasonal position with a public employer other than the state. However, the term does not include:

(a) a temporary position as defined in 2-18-101 for a state position or similar temporary position with a public employer other than the state;

(b) a state or local elected official;

(c) employment as an elected official's immediate secretary, legal advisor, or administrative, legislative, or other immediate or first-line aide;

(d) appointment by an elected official to a body such as a board, commission, committee, or council;

(e) appointment by an elected official to a public office if the appointment is provided for by law;

(f) a department head appointment by the governor or an executive department head appointment by a mayor, city manager, county commissioner, or other chief administrative or executive officer of a local government; or

(g) engagement as an independent contractor or employment by an independent contractor.

(7) (a) "Public employer" means:

(i) any department, office, board, bureau, commission, agency, college, including a community college, postsecondary vocational-technical center or program, university, or other instrumentality of the executive, judicial, or legislative branch of the government of the state of Montana; and

(ii) any county, city, or town.

(b) The term does not include a school district, a special purpose district, an authority, or any political subdivision of the state other than a county, city, or town.

(8) "Substantially equal qualifications" means the qualifications of two or more persons among whom the public employer cannot make a reasonable determination that the qualifications held by one person are significantly better suited for the position than the qualifications held by the other persons.

(9) "Under honorable conditions" means a discharge or separation from active duty characterized as under honorable conditions. The term includes honorable discharges and general discharges but does not include dishonorable discharges or other administrative discharges characterized as other than honorable.

(10) (a) "Veteran" means a person who:

(i) served on active duty during time of war or declared national emergency or in a campaign or expedition for which a campaign badge was authorized by the United States Congress or the United States department of defense; and

(ii) has been separated from service under honorable conditions.

(b) The term does not include a person receiving retirement pay from the United States based on length of military service.

(11) "War or declared national emergency" means:

(a) World War I, beginning on April 6, 1917, and

ending on November 11, 1918, both dates inclusive;

(b) World War II, beginning on December 7, 1941, and ending on December 31, 1946, both dates inclusive;

(c) the Korean conflict, military expedition, or police action, beginning on June 27, 1950, and ending on January 31, 1955, both dates inclusive; and

(d) the Vietnam conflict, beginning on August 5, 1964, and ending on May 7, 1975, both dates inclusive.

NEW SECTION. Section 4. Employment preference in initial hiring. (1) (a) Except as provided in 10-2-402, in an initial hiring for a position, if a job applicant who is a veteran, disabled veteran, handicapped person, or eligible spouse meets the eligibility requirements contained in [section 5] and claims a preference as required by [section 8], a public employer shall hire the applicant over any other applicant with substantially equal qualifications who is not a preference eligible applicant.

(b) In an initial hiring, a public employer shall hire a disabled veteran over any other preference eligible applicant with substantially equal qualifications.

(2) The employment preference provided for in subsection (1) does not apply to a personnel action described in subsection (5)(b) of [section 3] or to any other personnel action that is not an initial hiring.

NEW SECTION. Section 5. Eligibility requirements. No

veteran, disabled veteran, eligible spouse, or handicapped person is entitled to receive employment preference as provided in [section 4] unless:

(1) he is a United States citizen;

(2) he has resided continuously in the state for at least 1 year immediately before applying for employment;

(3) if applying for municipal or county employment, he has resided for at least 30 days immediately before applying for employment in the city, town, or county in which employment is sought; and

(4) he meets those requirements considered necessary by a public employer to successfully perform the essential duties of the position for which he is applying.

NEW SECTION. Section 6. Certification of handicapped persons. The department of social and rehabilitation services shall certify persons as handicapped for the purpose of employment preference as provided in [sections 1 through 10].

NEW SECTION. Section 7. Duration of employment preference. Subject to [section 5]:

(1) a handicapped person, the spouse of a handicapped person as described in subsection (3)(b)(iii) of [section 3], a disabled veteran, or the spouse of a disabled veteran as described in subsection (3)(b)(i) of [section 3] qualifies for employment preference as long as the disabling

condition exists;

(2) a veteran, as defined in [section 3], who is not a disabled veteran, as defined in [section 3], qualifies for employment preference for life. However, once he has obtained a position because of the application of the employment preference, he may not use the preference again.

(3) the surviving spouse of a veteran as described in subsection (3)(a) of [section 3] qualifies for employment preference for as long as the spouse remains unmarried; and

(4) the spouse of a person described in subsection (3)(b)(ii) of [section 3] qualifies for employment preference for as long as the person is missing in action or a prisoner of war.

NEW SECTION. Section 8. Enforcement of preference. (1) A public employer shall, by posting and on the application form, give notice of the preferences that [sections 1 through 10] provide in public employment.

(2) A job applicant who believes he has an employment preference shall claim the preference in writing before the time for filing applications for the position involved has passed. Failure to make a timely employment preference claim is a complete defense to an action under subsection (4).

(3) If an applicant for a position makes a timely written employment preference claim, the public employer shall give written notice of its hiring decision to each

applicant claiming preference.

(4) (a) An applicant who believes he has not been accorded his rights under [sections 1 through 10] may, within 30 days of receipt of the notice of the hiring decision, submit to the public employer a written request for an explanation of the public employer's hiring decision. Within 15 days of receipt of the request, the public employer shall give the applicant a written explanation.

(b) The applicant may, within 90 days after receipt of notice of the hiring decision, file a petition in the district court in the county in which his application was received by the public employer. The petition must state facts which on their face entitle the applicant to an employment preference.

(c) (i) Upon filing of the petition, the court shall order the public employer to appear in court at a specified time not less than 10 or more than 30 days after the day the petition was filed and show cause why the applicant was not hired for the position. The public employer has the burden of making a clear showing that the applicant was not substantially equally qualified with the person hired.

(ii) The time to appear provided in subsection (4)(c)(i) may be waived by stipulation of the parties. If a time to appear has been specified pursuant to subsection (4)(c)(i), the court may, on motion of one of the parties or

on stipulation of all of the parties, grant a continuance.

(iii) If the public employer does not carry its burden of proof under subsection (4)(c)(i), the court shall order the public employer to reopen the selection process for the position involved and shall grant the applicant reasonable attorney fees and court costs. The remedy provided by this section is the only remedy for a violation of [sections 1 through 10], and a court may not grant any other relief in an action for violation of [sections 1 through 10].

(d) Failure of an applicant to file a petition under subsection (4)(b) within 90 days bars the filing of a petition. If a public employer fails to provide an explanation under subsection (4)(a) within 15 days and a petition is filed under subsection (4)(b), the court shall order the public employer to reopen the selection process.

(e) The Montana Rules of Civil Procedure apply to a proceeding under this subsection (4) to the extent that they do not conflict with this subsection (4).

NEW SECTION. Section 9. Adoption of rules. The department of administration shall adopt rules implementing [sections 1 through 10] and shall consult with the department of social and rehabilitation services in adopting rules governing certification of handicapped persons for purposes of [sections 1 through 10]. The department of administration's rules apply to all public employers, local

as well as state.

NEW SECTION. Section 10. Conflicts with federal law. [Sections 1 through 10] do not apply to work or positions subject to federal laws or regulations if application of the employment preference conflicts with those laws or regulations.

Section 11. Section 10-2-402, MCA, is amended to read:

"10-2-402. Superintendent to be given veteran's preference. In the selection of the superintendent of the Montana veterans' home, the department of institutions shall ~~give preference to veterans as defined in 10-2-202~~ apply the preference granted to veterans and disabled veterans, but not the preference granted to other persons, by [sections 1 through 10]."

Section 12. Section 49-3-103, MCA, is amended to read:

"49-3-103. Permitted distinctions. Nothing in this chapter shall prohibit any public or private employer:

(1) from enforcing a differentiation based on marital status, age, or physical or mental handicap:

(a) when based on the preference provided in [sections 1 through 10];

(b) when based on a bona fide occupational qualification reasonably necessary to the normal operation of the particular business; or

(c) where the differentiation is based on reasonable

factors other than age;

(2) from observing the terms of a bona fide seniority system or any bona fide employee benefit plan, such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual; or

(3) from discharging or otherwise disciplining an individual for good cause."

Section 13. Section 49-3-201, MCA, is amended to read:

"49-3-201. Employment of state and local government personnel. (1) ~~State~~ Except as provided in [sections 1 through 10], state and local government officials and supervisory personnel shall recruit, appoint, assign, train, evaluate, and promote personnel on the basis of merit and qualifications without regard to race, color, religion, creed, political ideas, sex, age, marital status, physical or mental handicap, or national origin.

(2) All state and local governmental agencies shall:

(a) promulgate written directives to carry out this policy and to guarantee equal employment opportunities at all levels of state and local government;

(b) regularly review their personnel practices to assure compliance; and

(c) conduct continuing orientation and training

programs with emphasis on human relations and fair employment practices.

(3) The department of administration shall insure that the entire examination process, including appraisal of qualifications, is free from bias.

(4) Appointing authorities shall exercise care to insure utilization of minority group persons."

NEW SECTION. Section 14. Repealer. Subject to section 16(3)(a) of this act, sections 10-2-201 through 10-2-206, MCA, are repealed.

NEW SECTION. Section 15. Severability. If a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

NEW SECTION. Section 16. Effective date — applicability — saving clause. (1) This act is effective on passage and approval.

(2) Except as provided in subsection (3)(b), this act applies only to positions that are filled after the effective date of this act.

(3) (a) Subject to the applicable statute of limitations and to subsection (3)(c), a claim for violation of 10-2-201 through 10-2-206, whether or not it is pending

in court on the effective date of this act, may be pursued under and must be governed by 10-2-201 through 10-2-206.

(b) However, the only relief that may be granted on a claim described in subsection (3)(a) is that provided in section 8(4)(c)(iii) of this act, and the court may grant no other relief, including that provided in 10-2-206 or any judicial construction of 10-2-206.

(c) A claim under 10-2-201 through 10-2-206 must be filed within 60 days after the effective date of this act.

-End-

APPENDIX E

SENATE BILL NO. 2

(Reference Bill)

STATEMENT OF INTENT

SENATE BILL 2

(Strike entire statement of intent and insert:)

A statement of intent is provided to address the nature of the employment preference granted in the bill. The legislature intends that public employers seek and hire the most qualified persons for positions in public employment. It is also the intent of the legislature that the nature of the preference is a relative one in that it is to be applied as a "tie-breaker" among two or more applicants for a position who have substantially equal qualifications. Substantially equal qualifications does not mean a situation in which two or more applicants are exactly equally qualified. It means a range within which two applicants must be considered to be substantially equal in view of the qualifications set for the job. ~~WHERE APPLICABLE ON SCORED EXAMS OR STRUCTURED INTERVIEWS, THE RANGE FOR SUBSTANTIALLY EQUAL WILL BE WITHIN 5 PERCENTAGE POINTS.~~ Qualifications should include job-related knowledge, skill, and abilities. The legislature recognizes that public employers use a variety of scored and unscored selection procedures such as conventional written examinations, training and experience requirements, performance tests, structured oral interviews, or combinations of these. The legislature does not intend to specify the type of selection procedure to be used by a public employer.

A statement of intent is also required for this bill because section 9 requires the department of administration to adopt rules implementing sections 1 through 10 and to consult with the department of social and rehabilitation services in formulating rules for the certification of handicapped persons.

The legislature intends the rules to adequately provide for the administration of the employment preference law, but to include only those rules that are reasonably necessary to implement sections 1 through 10.

It is the desire of the legislature that the department take all necessary steps in formulating, proposing, and adopting rules to ensure that the public, particularly those persons and organizations that have shown past interest in the employment preference law, is afforded sufficient time and opportunity to participate in the rulemaking procedure. The department should give such notice and hold such hearings as will ensure adequate public participation.

Rules adopted by the department apply to all initial hirings to positions by all public employers. In formulating its rules the department should take this into consideration and adopt rules that can be used and applied by the broad spectrum of state and local public employers subject to

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sections 1 through 10.

It is the intent of the legislature that the department formulate and adopt rules relating, but not limited, to the following matters and take into account the following considerations.

(1) Claiming preference -- documentation and verification. Rules relating to the job application process should include the manner in which a preference should be claimed when a job is applied for. They should prescribe the means by which the applicant must document and submit evidence of such things as the applicant's status as a Montana resident when--he--entered--the--service, veteran, disabled veteran, handicapped person, or eligible spouse. It is the intent of the legislature that rules for claiming and documenting a preference do not place unreasonable burdens upon applicants.

(2) Handicapped persons -- certification. The rules should provide that a person will not be denied handicapped status and certification merely because of his current or former employment, should address the matter of what constitutes a physical or mental impairment that substantially limits one or more major life activities, and outline in what instances a physical or mental impairment limits a person's ability to obtain, retain, or advance in employment. The department may wish to do this by a

combination of a statement of general principles and specific examples.

Rules should provide for a certification process that allows, when appropriate, permanent certification of those impairments considered to be permanent in nature. A procedure for extension or loss of certification should be provided for those instances in which a handicap is or may be temporary.

(3) Military conflicts. The legislature intends the rules to apply federal law to determine what constitutes a campaign or expedition for which a campaign badge is authorized by the Congress of the United States or department of defense.

(4) Honorable discharges. The legislature intends the rules to apply federal law in defining honorable discharges.

(5) Hiring decision notices and explanations. The legislature intends the rules to provide for the form and content of written notices of hiring decisions, including whether the position was obtained as the result of application of the preference by the public employer, written requests for explanations of hiring decisions, and written explanations of hiring decisions.

(6) Reopening of selection process. The legislature intends the rules to provide for a method of reopening the selection process for a job should a court order the

selection process reopened, and include a method of giving notice to those who applied for the job informing them of the reopening and the reason therefor.

(7) Jobs subject to federal law. The legislature intends the rules to identify or provide a method of identifying work or positions to which the employment preference does not apply by virtue of section 10.

SENATE BILL NO. 2

INTRODUCED BY MAZUREK, M. HAMMOND, TVEIT, HAFFEY

BY REQUEST OF THE JOINT INTERIM SUBCOMMITTEE NO. 4

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING PREFERENCE IN PUBLIC EMPLOYMENT FOR CERTAIN MILITARY VETERANS AND HANDICAPPED PERSONS AND THEIR ELIGIBLE SPOUSES; RECONCILING THE PREFERENCE STATUTES WITH THE HUMAN RIGHTS STATUTES; AMENDING ~~SECTIONS~~ SECTION 10-2-402, ~~49-3-103, AND 49-3-201,~~ MCA; REPEALING SECTIONS 10-2-201 THROUGH 10-2-206, MCA; PROVIDING FOR PARTIAL RETROACTIVE EFFECT OF THE REPEAL; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND AN APPLICABILITY DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. Section 1. Short title. [Sections 1 through 10] may be cited as the "Montana Veterans and Handicapped Persons Employment Preference Act".

NEW SECTION. Section 2. Purposes. ~~(1)~~ The purposes of [sections 1 through 10] are to reward RECOGNIZE veterans AND DISABLED VETERANS for service to their country, recognize past employment discrimination against handicapped persons, and facilitate the habilitation, rehabilitation, and readjustment of veterans, DISABLED VETERANS, and handicapped persons.

~~(2) THE PROVISIONS OF [SECTIONS 1 THROUGH 10], EXCEPT FOR COSTS AND ATTORNEY FEES, ARE INTENDED TO REMEDY THE UNCERTAINTY WHETHER STATE BURDEN ON THE COURTS, BURDEN ON THE STATE TREASURY, AND PUBLIC CONCERN CAUSED BY THE INTERPRETATION OF THE FORMER PREFERENCE PROVISIONS IN CONFLICT WITH LONG-ESTABLISHED CUSTOMS AND PRACTICES BY PUBLIC HIRING AUTHORITIES. IT IS THE LEGISLATURE'S FINDING THAT THE PROVISIONS OF [SECTIONS 1 THROUGH 10], EXCEPT FOR COSTS AND ATTORNEY FEES, REFLECT THE ORIGINAL INTENT OF 10-2-201 THROUGH 10-2-206.~~

NEW SECTION. Section 3. Definitions. For the purposes of [sections 1 through 10], the following definitions apply:

(1) "Active duty" means full-time duty other than for training in the regular components of the United States army, air force, navy, marine corps, or coast guard with full pay and allowances. The term does not include monthly drills, summer encampments, initial training, or other inactive or active duty for training in the national guard or reserves.

(2) "Disabled veteran" means an individual, WHETHER OR NOT HE IS A VETERAN AS DEFINED IN THIS SECTION, who:

(a) served on active duty;

(b) has been separated from service ~~under honorable conditions~~ BY HONORABLE DISCHARGE; and

(c) suffers a service-connected disability ~~of~~

determined by the United States veterans administration ~~to be 30% or more disabling~~ TO BE 30% OR MORE DISABLING.

(3) "Eligible spouse" means:

(a) the unremarried surviving spouse of a veteran who died while on active duty or whose death resulted from a service-connected disability; or

(b) the spouse of:

(i) a DISABLED veteran determined by the United States veterans administration to have a 100% service-connected disability who is unable to use his employment preference because of his disability;

(ii) a person on active duty determined by the United States government to be missing in action or a prisoner of war; or

(iii) a handicapped person determined by the department of social and rehabilitation services to have a 100% disability who is unable to use his employment preference because of his disability.

(4) "Handicapped person" means an individual certified by the department of social and rehabilitation services to have a physical OR MENTAL impairment that substantially limits one or more major life activities, such as writing, seeing, hearing, speaking, or mobility, and which limits the individual's ability to obtain, retain, or advance in employment.

(5) (a) "Initial hiring" means a personnel action for which applications are solicited from outside the ranks of the current employees of:

(i) a department, as defined in 2-15-102, for a position within the executive branch;

(ii) a legislative agency, such as the consumer counsel, environmental quality council, office of the legislative auditor, legislative council, or office of the legislative fiscal analyst, for a position within the legislative branch;

(iii) a judicial agency, such as the office of supreme court administrator, office of supreme court clerk, state law li: , similar office in a state district court for a position within the judicial branch;

~~(iv) a unit as defined in 20-25-201, for a position within the Montana university system~~

~~(v) the office of commissioner of higher education for a position within that office~~

~~(vi) a college for a position within that college~~

~~(vii) a center or program for a position within the postsecondary vocational-technical education system~~

~~(viii) a unit as defined in 20-25-201 for a position within the Montana university system~~

~~(ix) the office of commissioner for a position within that office~~

~~(V)(A) A COLLEGE FOR A POSITION WITHIN THAT COLLEGE~~

~~(B)~~ (IV) a city or town for a municipal position, including a city or municipal court position; and

~~(C)~~ (V) a county for a county position, including a justice's court position.

(b) A personnel action limited to current employees of a specific public entity identified in subsections (a)(i) through (a)~~(C)~~(V) of this subsection (5), current employees in a reduction-in-force pool who have been laid off from a specific public entity identified in subsections (a)(i) through (a)~~(C)~~(V) of this subsection (5), or current participants in a federally authorized employment program is not an initial hiring.

(6) "Position" means a permanent or seasonal position as defined in 2-18-101 for a state position or a similar permanent or seasonal position with a public employer other than the state. However, the term does not include:

(a) a temporary position as defined in 2-18-101 for a state position or similar temporary position with a public employer other than the state;

(b) a state or local elected official;

(c) employment as an elected official's immediate secretary, legal advisor, COURT REPORTER, or administrative, legislative, or other immediate or first-line aide;

(d) appointment by an elected official to a body such

as a board, commission, committee, or council;

(e) appointment by an elected official to a public office if the appointment is provided for by law;

(f) a department head appointment by the governor or an executive department head appointment by a mayor, city manager, county commissioner, or other chief administrative or executive officer of a local government; or

(g) engagement as an independent contractor or employment by an independent contractor.

(7) (a) "Public employer" means:

(i) any department, office, board, bureau, commission, agency, college, ~~including a community college, postsecondary vocational-technical center or program,~~ university, ~~COLLEGE, INCLUDING A COMMUNITY COLLEGE, UNIVERSITY~~ or other instrumentality of the executive, judicial, or legislative branch of the government of the state of Montana; and

(ii) any county, city, or town.

(b) The term does not include a school district, ~~A COMMUNITY COLLEGE, A POSTSECONDARY VOCATIONAL-TECHNICAL CENTER OR PROGRAM, THE BOARD OF REGENTS OF HIGHER EDUCATION, THE MONTANA UNIVERSITY SYSTEM,~~ A COMMUNITY COLLEGE, THE BOARD OF REGENTS OF HIGHER EDUCATION, THE MONTANA UNIVERSITY SYSTEM, a special purpose district, an authority, or any political subdivision of the state other than a county,

city, or town.

(8) "Substantially equal qualifications" means the qualifications of two or more persons among whom the public employer cannot make a reasonable determination that the qualifications held by one person are significantly better suited for the position than the qualifications held by the other persons. ~~IN A SCORED SELECTION PROCEDURE THE RANGE FOR SUBSTANTIALLY EQUAL WILL BE WITHIN 5 PERCENTAGE POINTS.~~

~~(9) "Under honorable conditions" means a discharge or separation from active duty characterized as under honorable conditions. The term includes honorable discharges and general discharges but does not include dishonorable discharges or other administrative discharges characterized as other than honorable.~~

~~(10)~~(9) (a) "Veteran" means a person who:

(i) served on active duty during time of war or declared national emergency or in a campaign or expedition for which a campaign badge was authorized by the United States congress or the United States department of defense; and

(ii) has been separated from service ~~under honorable conditions~~ BY HONORABLE DISCHARGE.

(b) The term does not include a ~~person receiving retirement pay from the United States based on length of military service~~ RETIRED MEMBER OF A REGULAR COMPONENT OF

THE UNITED STATES ARMED FORCES WHO IS ELIGIBLE FOR OR RECEIVING A MILITARY RETIREMENT ALLOWANCE BASED ON LENGTH OF SERVICE AND DOES NOT INCLUDE ANY OTHER RETIRED MEMBER OF A PUBLIC RETIREMENT SYSTEM, EXCEPT SOCIAL SECURITY, THAT IS SUPPORTED IN WHOLE OR IN PART BY TAX REVENUES.

~~(11)~~(10) "War or declared national emergency" means:

(a) World War I, beginning on April 6, 1917, and ending on November 11, 1918, both dates inclusive;

(b) World War II, beginning on December 7, 1941, and ending on December 31, 1946, both dates inclusive;

(c) the Korean conflict, military expedition, or police action, beginning on June 27, 1950, and ending on January 31, 1955, both dates inclusive; and

(d) the Vietnam conflict, beginning on August 5, 1964, and ending on May 7, 1975, both dates inclusive.

(11) (A) "MENTAL IMPAIRMENT" MEANS:

(I) SUFFERING FROM A DISABILITY ATTRIBUTABLE TO MENTAL RETARDATION, CEREBRAL PALSY, EPILEPSY, AUTISM, OR ANY OTHER NEUROLOGICALLY HANDICAPPING CONDITION CLOSELY RELATED TO MENTAL RETARDATION AND REQUIRING TREATMENT SIMILAR TO THAT REQUIRED BY MENTALLY RETARDED INDIVIDUALS; OR

(II) AN ORGANIC OR MENTAL IMPAIRMENT THAT HAS SUBSTANTIAL ADVERSE EFFECTS ON AN INDIVIDUAL'S COGNITIVE OR VOLITIONAL FUNCTIONS.

(B) THE TERM MENTAL IMPAIRMENT DOES NOT INCLUDE

ALCOHOLISM OR DRUG ADDICTION AND DOES NOT INCLUDE ANY MENTAL IMPAIRMENT, DISEASE, OR DEFECT THAT HAS BEEN ASSERTED BY THE INDIVIDUAL CLAIMING THE PREFERENCE AS A DEFENSE TO ANY CRIMINAL CHARGE.

NEW SECTION. Section 4. Employment preference in initial hiring. (1) (a) Except as provided in 10-2-402, in an initial hiring for a position, if a job applicant who is a veteran, disabled veteran, handicapped person, or eligible spouse meets the eligibility requirements contained in [section 5] and claims a preference as required by [section 6], a public employer shall hire the applicant over any other applicant with substantially equal qualifications who is not a preference eligible applicant.

(b) In an initial hiring, a public employer shall hire a disabled veteran OR HANDICAPPED PERSON over any other preference eligible applicant with substantially equal qualifications.

(2) The employment preference provided for in subsection (1) does not apply to a personnel action described in subsection (5)(b) of [section 3] or to any other personnel action that is not an initial hiring.

NEW SECTION. Section 5. Eligibility requirements. (1) No veteran, disabled veteran, eligible spouse, or handicapped person is entitled to receive employment preference as provided in [section 4] unless:

~~(i) he is a United States citizen~~

~~(c) he has resided continuously in the state for at least 1 year immediately before applying for employment~~

~~(3) if applying for municipal or county employment, he has resided for at least 30 days immediately before applying for employment in the city, town, or county in which employment is sought; and~~

(1) HE IS A UNITED STATES CITIZEN;

(2) HE HAS RESIDED CONTINUOUSLY IN THE STATE FOR AT LEAST 1 YEAR IMMEDIATELY BEFORE APPLYING FOR EMPLOYMENT;

(3) IF APPLYING FOR MUNICIPAL OR COUNTY EMPLOYMENT, HE HAS RESIDED FOR AT LEAST 30 DAYS IMMEDIATELY BEFORE APPLYING FOR EMPLOYMENT IN THE CITY, TOWN, OR COUNTY IN WHICH EMPLOYMENT IS SOUGHT; AND

~~(4)~~(4) he meets those requirements considered necessary by a public employer to successfully perform the essential duties of the position for which he is applying.

~~(2) IN ADDITION TO THE ELIGIBILITY REQUIREMENT REQUIRED IN SUBSECTION (1), ANY VETERAN WHOSE SERVICE IN THE ARMED FORCES FORMS THE BASIS OF AN EMPLOYMENT PREFERENCE UNDER SECTIONS 1 THROUGH 10 MUST HAVE ELAIMED MONTANA AS HIS HOME OF RECORD AT ENTRY INTO THE ARMED FORCES, AS INDICATED ON HIS CERTIFICATE OF RELEASE OR DISCHARGE FROM ACTIVE DUTY (DD FORM 214).~~

NEW SECTION. Section 6. Certification of handicapped

persons. The department of social and rehabilitation services shall certify persons as handicapped for the purpose of employment preference as provided in [sections 1 through 10].

NEW SECTION. Section 7. Duration of employment preference. Subject to [section 5]:

(1) a handicapped person, the spouse of a handicapped person as described in subsection (3)(b)(iii) of [section 3], a disabled veteran, or the spouse of a disabled veteran as described in subsection (3)(b)(i) of [section 3] qualifies for employment preference as long as the disabling condition exists;

(2) a veteran, as defined in [section 3], who is not a disabled veteran, as defined in [section 3], qualifies for employment preference for ~~life. However, once he has~~ obtained a PERMANENT position because of the application of the employment preference, he may not use the preference again NO LONGER THAN ~~10~~ 15 YEARS FOLLOWING SEPARATION FROM SERVICE OR FOR NO LONGER THAN ~~10~~ 5 ~~10~~ 5 YEARS FOLLOWING [THE EFFECTIVE DATE OF THIS ACT], WHICHEVER IS LATER.

(3) the surviving spouse of a veteran as described in subsection (3)(a) of [section 3] qualifies for employment preference for as long as the spouse remains unmarried; and

(4) the spouse of a person described in subsection (3)(b)(ii) of [section 3] qualifies for employment

preference for as long as the person is missing in action or a prisoner of war.

NEW SECTION. Section 8. Enforcement of preference. (1) A public employer shall, by posting and OR on the application form, give notice of the preferences that [sections 1 through 10] provide in public employment.

(2) A job applicant who believes he has an employment preference shall claim the preference in writing before the time for filing applications for the position involved has passed. Failure to make a timely employment preference claim FOR A POSITION is a complete defense to an action IN REGARD TO THAT POSITION under subsection (4).

(3) If an applicant for a position makes a timely written employment preference claim, the public employer shall give written notice of its hiring decision to each applicant claiming preference.

(4) (a) An applicant who believes he has not been accorded his rights under [sections 1 through 10] may, within 30 days of receipt of the notice of the hiring decision, submit to the public employer a written request for an explanation of the public employer's hiring decision. Within 15 days of receipt of the request, the public employer shall give the applicant a written explanation.

(b) The applicant may, within 90 days after receipt of notice of the hiring decision, file a petition in the

district court in the county in which his application was received by the public employer. The petition must state facts which on their face entitle the applicant to an employment preference.

(c) (i) Upon filing of the petition, the court shall order the public employer to appear in court at a specified time not less than 10 or more than 30 days after the day the petition was filed and show cause why the applicant was not hired for the position. ~~The~~ AT THE HEARING, THE public employer has the burden of ~~making a clear showing that the applicant was not substantially equally qualified with the person hired~~ PROVING BY A PREPONDERANCE OF THE EVIDENCE THAT THE EMPLOYER MADE A REASONABLE DETERMINATION PURSUANT TO SUBSECTION (8) OF [SECTION 3] AND THE APPLICANT HAS THE BURDEN OF PROVING BY A PREPONDERANCE OF THE EVIDENCE THAT HE IS A PREFERENCE ELIGIBLE APPLICANT.

(ii) The time to appear provided in subsection (4)(c)(i) may be waived by stipulation of the parties. If a time to appear has been specified pursuant to subsection (4)(c)(i), the court may, on motion of one of the parties or on stipulation of all of the parties, grant a continuance.

(iii) If the public employer does not carry its burden of proof under subsection (4)(c)(i) AND THE COURT HAS FOUND THAT THE APPLICANT IS A PREFERENCE ELIGIBLE APPLICANT, the court shall order the public employer to reopen the

selection process for the position involved and shall grant the applicant reasonable attorney fees and court costs. The remedy provided by this section is the only remedy for a violation of [sections 1 through 10], and a court may not grant any other relief in an action for violation of [sections 1 through 10].

(d) Failure of an applicant to file a petition under subsection (4)(b) within 90 days bars the filing of a petition. If a public employer fails to provide an explanation under subsection (4)(a) within 15 days and a petition is filed under subsection (4)(b), the court shall order the public employer to reopen the selection process.

(e) The Montana Rules of Civil Procedure apply to a proceeding under this subsection (4) to the extent that they do not conflict with this subsection (4).

NEW SECTION. Section 9. Adoption of rules. The department of administration shall adopt rules implementing [sections 1 through 10] and shall consult with the department of social and rehabilitation services in adopting rules governing certification of handicapped persons for purposes of [sections 1 through 10]. The department of administration's rules apply to all public employers, local as well as state.

NEW SECTION. Section 10. Conflicts with federal law. [Sections 1 through 10] do not apply to work or positions

subject to federal laws or regulations if application of the employment preference conflicts with those laws or regulations.

Section 11. Section 10-2-402, MCA, is amended to read:

"10-2-402. Superintendent to be given veteran's preference. In the selection of the superintendent of the Montana veterans' home, the department of institutions shall ~~give preference to veterans as defined in 10-2-202~~ apply the preference granted to veterans and disabled veterans, but not the preference granted to other persons, by [sections 1 through 10]."

~~Section 12. Section 49-3-103, MCA, is amended to read:~~

~~"49-3-103. Permitted distinctions. Nothing in this chapter shall prohibit any public or private employer:~~

~~(1) from enforcing a differentiation based on marital status, age, or physical or mental handicap;~~

~~(a) when based on the preference provided in [sections 1 through 10];~~

~~(b) when based on a bona fide occupational qualification reasonably necessary to the normal operation of the particular business; or~~

~~(c) where the differentiation is based on reasonable factors other than age;~~

~~(2) from observing the terms of a bona fide seniority system or any bona fide employee benefit plan, such as a~~

~~retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual; or~~

~~(3) from discharging or otherwise disciplining an individual for good cause."~~

~~Section 13. Section 49-3-201, MCA, is amended to read:~~

~~"49-3-201. Employment of state and local government personnel. (1) State Except as provided in [sections 1 through 10], state and local government officials and supervisory personnel shall recruit, appoint, assign, train, evaluate, and promote personnel on the basis of merit and qualifications without regard to race, color, religion, creed, political ideas, sex, age, marital status, physical or mental handicap, or national origin.~~

~~(2) All state and local governmental agencies shall:~~

~~(a) promulgate written directives to carry out this policy and to guarantee equal employment opportunities at all levels of state and local government;~~

~~(b) regularly review their personnel practices to assure compliance; and~~

~~(c) conduct continuing orientation and training programs with emphasis on human relations and fair employment practices.~~

~~(3) The department of administration shall insure that~~

~~the--entire--examination--process,--including--appraisal--of qualifications,-is-free-from-bias.~~

~~(4)--Appointing--authorities--shall--exercise--care--to insure-utilization-of-minority-group-persons.~~"

NEW SECTION. SECTION 12. THE APPLICATION OF AN EMPLOYMENT PREFERENCE AS PROVIDED FOR IN [SECTIONS 1 THROUGH 10] AND 10-2-402 BY A PUBLIC EMPLOYER AS DEFINED IN [SECTION 3] MAY NOT BE CONSTRUED TO CONSTITUTE A VIOLATION OF THIS CHAPTER.

NEW SECTION. SECTION 13. THE APPLICATION OF AN EMPLOYMENT PREFERENCE AS PROVIDED FOR IN [SECTIONS 1 THROUGH 10] AND 10-2-402 BY A PUBLIC EMPLOYER AS DEFINED IN [SECTION 3] MAY NOT BE CONSTRUED TO CONSTITUTE A VIOLATION OF THIS CHAPTER.

~~NEW-SECTION.--SECTION-14.--SUBMISSION--OF--DATA.---EACH PUBLIC-EMPLOYER-SHALL-SUBMIT-TO-EACH-REGULAR-SESSION-OF--THE LEGISLATURE--A--REPORT--CONTAINING--DATA-REGARDING-VETERANS' EMPLOYMENT-UNDER-THE-PROVISIONS-OF-THIS-ACT.~~

NEW SECTION. Section 14. Repealer. ~~Subject-to-section 6(3)(a)-of-this-act,-sections--10-2-201--through--10-2-206, MCA,--are-repealed.~~ SECTIONS 10-2-201 THROUGH 10-2-206, MCA, ARE REPEALED. THIS REPEAL APPLIES RETROACTIVELY TO BAR ANY CLAIM OF VIOLATION OR APPLICATION OF 10-2-201 THROUGH 10-2-206 THAT HAS NOT BEEN REDUCED TO JUDGMENT, WHETHER OR NOT THE JUDGMENT IS FINAL, ON [THE EFFECTIVE DATE OF THIS

ACT]. CLAIMS UNDER 10-2-201 THROUGH 10-2-206 THAT HAVE BEEN REDUCED TO JUDGMENT, WHETHER OR NOT THE JUDGMENT IS FINAL, ON [THE EFFECTIVE DATE OF THIS ACT] ARE ENFORCEABLE. NO CLAIM FOR A VIOLATION OF 10-2-201 THROUGH 10-2-206 MAY BE MADE UNDER [SECTION 8] OF THIS ACT.

NEW SECTION. Section 15. Severability. If a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

NEW SECTION. Section 16. Effective date -- applicability ~~--saving-clause~~. (1) This act is effective on passage and approval.

(2) Except as provided in ~~subsection (3)(b)~~ SECTION ~~14~~ 15, this act applies only to positions that are filled after the effective date of this act.

~~(3)(a)--Subject---to---the---applicable---statute---of limitations--and-to-subsection-(3)(c),-a-claim-for-violation of-10-2-201-through-10-2-206,-whether-or-not-it--is--pending in--court--on-the-effective-date-of-this-act-may-be-pursued under-and-must-be-governed-by-10-2-201-through-10-2-206.~~

~~(b)--However,-the-only-relief-that-may-be-granted-on--a claim--described--in--subsection--(3)(a)-is-that-provided-in section-8(4)(c)(iii)-of-this-act-and-the-court-may-grant-no~~

other relief, including that provided in 18-2-206 or any judicial construction of 18-2-206.

NEW SECTION. Section 17. Codification instruction. (1) Section 12 is intended to be codified as an integral part of Title 49, chapter 2, and the provisions of Title 49, chapter 2, apply to section 12.

(2) Section 13 is intended to be codified as an integral part of Title 49, chapter 3, and the provisions of Title 49, chapter 3, apply to section 13.

-End-

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